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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 555

THE NEZ PERCE TRIBE OF INDIANS AND WILLIAM N. STEVENS, *Petitioners,*

v.

FRED A. SEATON, Secretary of the Interior, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on May 29, 1958.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit is reported at 257 F. 2d 206,

and is reprinted as Appendix A hereto, p. 1a. The Court's unreported orders denying the petition for rehearing are annexed hereto as Appendix B, p. 2a. The oral statement of the District Court for the District of Columbia upon entering judgment is also unreported and is annexed hereto as Appendix C, p. 3a.

JURISDICTION

The judgment of the Court of Appeals was entered on May 29, 1958, and a timely petition for rehearing en banc was denied without opinion on September 5, 1958, Judge Burger dissenting. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the plea of sovereign immunity prevents the District Court from considering the merits of a suit in which plaintiffs contend that defendant Secretary of the Interior is attempting to convey their land to third parties in excess of his statutory authority and is depriving them of their property without due process of law, in violation of the Constitution of the United States?

2. Whether plaintiffs, who merely seek injunctive relief (rather than mandamus), must show, in order to defeat a plea of sovereign immunity, that the Government officer has violated a "plain legal duty," and, if so, whether this duty must appear "plainly" from both pleadings or merely from the complaint?

STATUTE INVOLVED

Act of June 4, 1953, 67 Stat. 41, 25 U.S.C. Sec. 293a:

> "The Secretary of the Interior, or his authorized representative, is authorized to convey to

State or local governmental agencies or to local school authorities all the right, title and interest of the United States in any land and improvements thereon and personal property used in connection therewith heretofore or hereafter used for Federal Indian school purposes and no longer needed for such purposes: Provided, That the consent of the beneficial owner shall be obtained before the conveyance of title to land held by the United States in trust for an individual Indian or Indian Tribe: . . ."

STATEMENT OF THE CASE

A complaint was filed in the District Court for the District of Columbia, pursuant to Sec. 306 of Title 11 of the District of Columbia Code, seeking to enjoin the respondent from delivering a deed to petitioner Tribe's land to third parties and further to enjoin him from interfering with petitioners' use of certain other land similarly situated, which included the Tribe's cemeteries.

The pleadings in this case show that the petitioner, the Nez Perce Tribe of Indians, is a recognized tribe of American Indians residing in the State of Idaho. The disputed land is located within the Tribe's area of original occupancy. Its rights to that land were confirmed by two treaties with the United States, concluded in 1855 (12 Stat. 957) and 1863 (14 Stat. 647).

The complaint alleged that the petitioner Tribe was the beneficial owner of a certain 1700-acre tract of land within the Nez Perce Reservation as established by the 1855 treaty. It was further alleged that the respondent Secretary of the Interior was unlawfully treating this land as the property solely of the United States, that he was leasing out portions of

the land without paying the proceeds to the Tribe and was threatening to convey 19 acres of this land to third parties, thus depriving the Tribe of its property without due process of law.

Being part of its ancient heritage, much of which has been lost, the disputed land is of unique and irreplaceable value to the Tribe. The unique character of these tracts is underlined by the fact that they include eight tribal graveyards, on which the Nez Perce Indians have buried their dead for many decades.

The respondent conceded the Tribe's ownership of the land in question prior to 1894 but asserted that in that year the land was acquired by the United States. Petitioners, on the other hand, contend that the land has always remained theirs.

The statute under which the respondent threatened to act in conveying a portion of the land to third parties is the Act of June 4, 1953, 67 Stat. 41, 25 U.S.C. § 293a. This statute authorizes the Secretary of the Interior to convey to local school authorities all right, title and interest of the United States in any land which has been but is no longer needed for federal Indian school purposes. But the statute also provides that the consent of the beneficial owner must be obtained before a conveyance is made of land held by the United States in trust for an Indian or an Indian Tribe. The complaint alleged that the petitioner Tribe, as beneficial owner of the land in issue, had not given its consent to the threatened transfer and that the respondent's threatened action was accordingly illegal by virtue of this statute.

The issues having been thus joined, cross motions for summary judgment were filed. The respondent's

motion asserted, *inter alia*, that the court was without jurisdiction to render judgment as the United States was an indispensable party which had not consented to be sued. The District Court, without hearing argument on the merits, granted respondent's motion for summary judgment and dismissed the complaint. It did so on the ground that this was in effect a suit against the United States, which had not consented to be sued.

The Court of Appeals affirmed the judgment of the District Court. The appellate court held that the question of ownership of the land was "highly debatable" but that it could not be settled in a suit in which the United States was not a party and had not consented to be sued. The court added that if the respondent Secretary "were violating a plain legal duty in regard to the lands, the case might be different." 257 F. 2d 206, 207. A petition for rehearing *en banc* was denied without opinion, one judge dissenting.

REASONS FOR GRANTING THE WRIT

1. The Decision of the Court of Appeals Is Directly Contrary to, and in Conflict With, the Applicable Decisions of This Court.

This Court has repeatedly held that where a suit is brought against a federal officer asserting that the officer is unlawfully depriving the complainant of vested property rights, the suit may be maintained without the presence of the United States. The exemption of the United States from suit does not protect its officers from liability to persons whose rights of property they have wrongfully invaded. *Land* v. *Dollar*, 330 U.S. 731 (1947); *Ickes* v. *Fox*, 300 U.S. 82 (1937); *Philadelphia Co.* v. *Stimson*, 223 U.S. 605 (1912); *United States* v. *Lee*, 106 U.S. 196 (1882).

Thus in *Land* v. *Dollar, supra,* this Court held that the doctrine of sovereign immunity does not apply to a suit to compel individual members of the United States Maritime Commission to return to the plaintiffs certain stock certificates, claimed to be owned by the plaintiffs although record title was in the Commission. The doctrine was likewise held inapplicable in *Ickes* v. *Fox, supra,* where suits were brought against the Secretary of the Interior alleging that his enforcement of an order would unlawfully deprive the complainants of vested water rights; the doctrine was rejected despite the defense that the water rights belonged to the United States.

In *Philadelphia Co.* v. *Stimson, supra,* involving an action to enjoin the Secretary of War from encroaching upon the plaintiff's property in alleged excess of his statutory authority, this Court ruled that it was not a suit against the United States since the complaint alleged an abuse of power which constituted an unwarranted interference with the complainant's property. And in *United States* v. *Lee, supra,* the sovereign immunity defense was denied in a suit brought by the son of General Robert E. Lee to eject certain individual officers of the United States from the family's Arlington estate, there being a highly controverted issue over the ownership of the estate.

The foregoing decisions are decisive of the instant case. They demonstrate beyond doubt that a suit against the Secretary of the Interior alleging that he is about to convey away lands without the consent of the alleged owner in asserted violation of the Secretary's statutory authority, is not a suit against the United States. The failure of the Court of Appeals to apply and adhere to these controlling decisions and

to reject the sovereign immunity doctrine in this instance calls for the invocation of the certiorari jurisdiction of this Court. Fair and consistent administration of justice in the federal courts demands that the applicable law be applied to this case.

Nothing in *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949), cited by the Court of Appeals below, justifies any adherence to the sovereign immunity doctrine in this instance. In the *Larson* case, this Court merely held that a federal officer could assert the defense of sovereign immunity in an action against him which alleged a common law tort. But the Court was careful to note that the defense is not available where, as here, the officer is sued on the basis of acts in excess of his statutory or constitutional power. In that situation, said this Court, his actions "are *ultra vires* his authority and therefore may be made the object of specific relief." 337 U.S. at 689.[1]

Nor can any of the factors referred to by the court below, to the effect that the United States claims full ownership of the land in question and that the issue of ownership is "highly debatable," serve to distinguish the controlling doctrine of the *Land, Fox, Philadelphia Co.* and *Lee* decisions. In all those cases, the United States asserted full title to the property involved, thereby raising a "highly debatable" issue of

[1] Mr. Justice Douglas, in becoming the fifth member of the Court to join in its opinion in the *Larson* case, stated in his concurrence that the invocation of the sovereign immunity doctrine was essential where the dispute involved the selling of government property. The opportunity to obtain government property, he felt, should not be available where it would "clog this governmental function with intolerable burdens." 337 U.S. at 705.

ownership as between the complainant and the United States. What made the sovereign immunity defense inapplicable was the fact—which is present in this case—that the complaint asserted that the disputed property was never property of the United States and charged that the federal officers had abused or violated their statutory or constitutional power. "The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States." *Philadelphia Co.* v. *Stimson*, 223 U.S. 605, 619 (1912).

Certainly the fact that the persons claiming ownership of the property in the *Land*, *Fox*, *Philadelphia Co.* and *Lee* cases were non-Indians asserting a fee title, whereas the claimant here is an Indian tribe alleging a trust title, is insufficient to distinguish those cases. The rights of an Indian Tribe in its ancestral land cannot be equated with the equitable rights of bondholders in the mortgaged property of the debtor company, as was done by the court below.[2] The fee title of the United States does not give the United States any proprietary interest. As this Court said in *Minnesota* v. *Hitchcock*, 185 U.S. 373, 387 (1902), "the United States has no substantial interest in [Indian] lands; . . . it holds the legal title under a contract with the Indians, and in trust for their benefit." Clearly, the trust relationship which the United States bears to its Indian wards imposes an even higher standard of accountability on federal officials than when they deal with other citizens. See *Jaybird Mining Co.* v. *Weir*, 271 U.S. 609, 612 (1926).

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[2] The reference in the decision of the Court of Appeals to *Land* v. *Dollar* refers over, *inter alia*, to *Cunningham* v. *Macon and Brunswick R.R. Co.*, 109 U.S. 446 (1883).

Squire v. *Capoeman*, 351 U.S. 1, 6-7 (1956). The trust relationship surely does not lessen the appropriate standards of accountability.

Indeed, any suggestion or implication that a federal official may freely commingle the property of an Indian Tribe with federal property and dispose of the former as he may see fit, in violation of statutory limitations, all in reliance upon the doctrine of sovereign immunity, is not only unconscionable but contrary to this Court's decision in *Chippewa Indians* v. *United States*, 301 U.S. 358, 375 (1937):

> "Our decisions, while recognizing that the government has power to control and manage the property and affairs of its Indian wards *in good faith for their welfare*, show that this power is subject to constitutional limitations and does not enable the government to give the lands of one tribe or band to another or to deal with them as its own." (Emphasis supplied.)

This principle was reaffirmed in *United States* v. *Klamath and Moadoc Tribes*, 304 U.S. 119, 123 (1938).

Although this Court held expressly in *Land* v. *Dollar*, *supra*, that where public officials "unlawfully seize or hold a citizen's realty or chattels, recoverable by appropriate action at law or in equity, he is not relegated to the Court of Claims to recover a money judgment," 330 U.S. at 738, it has also been suggested that availability of a remedy in the Court of Claims might defeat jurisdiction in an injunction suit. But no adequate relief would be available in the instant case in the Court of Claims. As already indicated, the lands in issue are of unique, irreplaceable value to the Nez Perce Indians. They include eight Tribal cemeteries. No money award by the Court of Claims

can possibly be an adequate substitute for the assurance that the Tribal ancestors may continue to rest in peace. No money award can be a substitute for the retention in Tribal ownership of ancient Nez Perce land. The facts of this case clearly call for application of the principles enunciated by this Court in *Land* v. *Dollar*, *Ickes* v. *Fox*, *Philadelphia Co.* v. *Stimson*, and *United States* v. *Lee*.

2. The Court of Appeals, in Holding That an Injunction Will be Denied Unless It Appears From Both Pleadings That a Government Officer Is Violating a "Plain Legal Duty," Misapplied Existing Legal Doctrine and Introduced a Mass of Confusion Into a Vital Area of Public Law.

The concluding sentence of the opinion below stated that the decision might have been different if "the Secretary were violating a plain legal duty in regard to the lands." Heretofore, the "plain legal duty" concept has been applied only in mandamus actions, where efforts are made to compel a government officer to take affirmative action. In such instances, the courts must determine whether the officer's ultimate decision to act is discretionary or whether the underlying statute or regulation imposes on him a mandatory "plain legal duty." See *Work* v. *United States ex rel. McAlester*, 262 U.S. 200, 206-7 (1923); *Wilbur* v. *United States ex rel. Kadric*, 281 U.S. 206, 221 (1930).

On the other hand, the "plain legal duty" rule, distinguishing legislative mandates from grants of discretionary authority, has obviously no bearing on suits to enjoin government officers from acting in excess of their constitutional authority. In the instant case, petitioners wanted to prevent respondent from conveying the disputed land. They do not seek to have

him compelled to convey and compelled to obtain their permission. If respondent decided to drop his plans to convey, petitioners would not object. It is thus not affirmative mandamus that is here sought. The introduction, by the Court of Appeals, of a legal doctrine which has no application to this case serves only to complicate further and unnecessarily an already complicated legal problem.

But if the "plain legal duty" test may appropriately be applied it would still have required reversal of the decision of the District Court. The pertinent statute provides that "the consent of the beneficial owner shall be obtained" by the Secretary before he can convey title to land held in trust for an Indian tribe. 67 Stat. 41, 25 U.S.C. § 293a. The law does not give the Secretary discretionary authority to determine ownership or discretionary authority to obtain Indian consent. The duty prescribed by the statute is as plain and mandatory as the English language will allow.

Thus the appellate court's observation, to be meaningful, must have required more than a mere examination of the language of the statute before determining whether there was a "plain legal duty." In the light of the result reached, two possible chains of reasoning present themselves, neither of which, however, is justified by the previous decisions of this Court:

(1) The court below may have been holding that the legal duty must not only be apparent from the allegations of the complaint, but must remain plain even if the allegations of the answer are considered. In other words, jusisdiction would obtain only where the federal officer concedes that he is wrong. Where

he denies any crucial allegation of the complaint, the issue becomes, as the court below put it, "highly debatable" and jurisdiction is defeated.

Such a result is plainly contrary to the entire line of decisions by this Court dealing with the doctrine of sovereign immunity, and would indeed abolish the exception to that doctrine which this Court has recognized since *Marbury* v. *Madison*, 1 Cranch (U.S.) 137 (1803). As was said in *Ickes* v. *Fox*, 300 U.S. 82, 96 (1937):

> "The motion to dismiss concedes [the plaintiffs'] allegations; but even if they were denied, we should still be obliged to indulge the presumption, in favor of the jurisdiction of the trial court, that respondents might be able to prove them . . ."

And in *Land* v. *Dollar*, 330 U.S. 731, 734-5 (1947), the Court stated:

> "The facts asserted in the affidavits support the view that the 1938 contract called for outright transfer of the shares, not for their pledge. But we put the affidavits to one side . . . [A]lthough as a general rule the District Court would have authority to consider questions of jurisdiction on the basis of affidavits as well as the pleadings, this is the type of case where the question of jurisdiction is dependent on decision of the merits.

(2) The only other possible interpretation of the reference to a "plain legal duty" by the court below is to assume that the court without stating that it did so, went beyond the pleadings, examined the merits, found them "highly debatable" and concluded that a "plain legal duty" could not be found. But where a court gives some but not full consideration to the

merits, how much consideration is it to give? What standards are to be applied? Where is the line to be drawn? On a motion to dismiss for lack of jurisdiction, should the District Court listen to the merits for a while and grant the motion as soon as it concludes that the merits are "highly debatable" and hence there was no "plain legal duty" to act?

Quite obviously, any such standard of action is without precedent and would be impossible to administer fairly or intelligently. The only standard which can be applied is the traditional one of basing initial jurisdiction on the pleadings and assuming for such purposes that the allegations of the complaint are correct. Only if the essential nature and effect of the proceeding "may be such as to make plain that the judgment sought will expend itself on the public treasury or domain, or interfere with the public administration," *Land* v. *Dollar*, 330 U.S. 731, 738 (1947), does it become proper to recognize the sovereign immunity defense.

The confusion resulting from the brief remarks in the decision below and the importance of this issue are such as to command the full review powers of this Court. The great number of suits against government officials arising in the District of Columbia courts is a substantial reason for clarifying and eliminating the highly dubious concepts that are both explicit and implicit in the opinion of the Court of Appeals.

3. The Issues Raised by the Decision Below Are Sufficiently Important and of a Recurring Nature to Warrant Full Review by This Court.

The decision below raises anew and in sharp focus the basic issue involved in the invocation of the sovereign immunity doctrine—the weighing of the orderly processes of public administration against the assertion of rights by an individual citizen or group of citizens. To allow such an assertion of rights, the courts have since *Marbury* v. *Madison*, 1 Cranch (U.S.) 137 (1803), recognized suits against government officers to restrain their illegal acts as an exception to the sovereign immunity doctrine.

In recent years, as this Court has observed, the "climate of opinion . . . has brought governmental immunity from suit into disfavor." *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U.S. 381, 391 (1939), *National City Bank* v. *Republic of China*, 348 U.S. 356, 359 (1955).[3] See also *Federal Housing Administration* v. *Burr*, 309 U.S. 242, 245 (1940). Only where a suit would truly "clog . . . governmental function with intolerable burdens" and where an adequate remedy in the Court of Claims was readily available has it been recognized as a proper defense. *Larson* v. *Domestic Foreign Commerce Corp.*, *supra*. Since the *Larson* case this Court has on numerous occasions entertained suits against government officers

[3] In his dissent in *Snyder* v. *Buck*, 340 U.S. 15 (1950), Mr. Justice Frankfurter observed: "The subject [of sovereign immunity], it has been recognized, is not free from casuistry because of the natural, even if unconscious, pressure to escape from the doctrine of sovereign immunity which—whatever its historic basis—is hardly a doctrine based upon moral considerations. The trend of deep sentiment, reflected by legislation and adjudication, has looked askance at the doctrine." 340 U.S. at 29.

in their public capacity and has decided them on the merits without mention of the sovereign immunity doctrine. See Table 1, p. 19, *infra*. In many recent instances the United States Department of Justice has not even considered it appropriate to raise the doctrine as a defense.

Admittedly, the adjudication of an isolated case on the merits, without reference to any jurisdictional issue, does not give rise to the presumption that the Court has decided the jurisdictional issue *sub silentio*. But where the Court has decided on their merits a long, continuing line of cases, all of which may suffer from the same jurisdictional defect, the question necessarily arises whether the alleged defect really exists.

Federal seizure of the steel industry (*Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952)), the application of the security program to non-sensitive federal agencies (*Cole* v. *Young*, 351 U.S. 536 (1956)), the negotiation of Status of Forces agreements (*Wilson* v. *Girard*, 354 U.S. 524 (1957)), all involved vital aspects of the sovereignty of the United States. Yet, oddly enough, when these issues were before this Court sovereign immunity was not urged as a defense. But where a few tracts of land in Idaho are involved, vital and irreplaceable to their owners, but of no significance to the Government, sovereign immunity, with all its majestic force, is brought into play.

What appears to be underlying this paradox is the assumption that sovereign immunity should be invoked only where there is a dispute over property in which the United States asserts a proprietary interest. This indeed seems to be the reasoning of the court below.

But this Court has never sanctioned such an interpretation of the doctrine. Not only does it lead to the absurd result of permitting judicial review of vital foreign policy issues, while prohibiting such review in the case of a minor property dispute, it also invites dishonesty by government officials. If the mere unproved assertion of a proprietary interest suffices to invoke the sovereign immunity doctrine, could the result in *Youngstown Sheet & Tube Co.* v. *Sawyer*, *supra*, have been avoided by having the seizure order vest title to the steel industry in the Government, so that government ownership of the property could be pleaded?

Petitioners assert that no special rule should apply to suits against government officers where property is at stake and government ownership of the property is asserted by the defendant but denied by the plaintiff. The unproved, disputed claim of ownership or the presence or absence of tangible or real property should have no relevance in evaluating the applicability of the sovereign immunity doctrine. And the prior decisions of this Court give no support to considering such factors in this context.[4] Our body of law must consist of meaningful rules of conduct and procedure, not of empty forms and phrases which bear no relation to reality. Yet, it is evidently the continuing assumption of the United States and of the lower courts that

[4] The *Larson* case was cited in three of the opinions of this Court in *Joint Anti-Fascist Refugee Com.* v. *McGrath*, 341 U.S. 123, 140, 152, 198 (1951). The *Philadelphia Co.* case was relied on most recently in *Harmon* v. *Brucker*, 355 U.S. 579, 582 (1958). This Court thus clearly considers the same broad jurisdictional principles governing suits against government officers to apply, whether the dispute is over a tract of land or an army discharge certificate.

fee title claims by the Government entitle a federal officer to raise the sovereign immunity shield even if it is not raised in far more vital cases. The thought that "sovereign immunity" can bar judicial consideration of property disputes in which the United States is involved but not of suits which test the authority of federal officials to exercise the most significant powers of sovereignty is so incongruous, yet so prevalent, that it deserves consideration and ultimate repudiation by this Court.

Nearly ten years have elapsed since this Court has spoken definitively on the sovereign immunity doctrine. *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949). During those years the doctrine has been clouded by various lower court decisions, particularly those of the court below. The Court of Appeals for the District of Columbia Circuit, the court most frequently and most directly confronted with the plea of sovereign immunity, has been deeply divided in its interpretation of the doctrine, especially in light of the *Larson* decision. See Table 2, p. 23, *infra*. In at least one instance Chief Judge Prettyman quite clearly expressed the hope that this Court would provide the Court of Appeals with further guidance in this area of law. Concurring in part in *Chapman* v. *El Paso Gas Co.*, 204 F. 2d 46 (1953), he observed:

> "I would hope that the Supreme Court will agree with my brethren that I am wrong in my reading of the Larson opinion. But unless it does so I am bound by what I understand it to have said." At 55.

This need for further guidance is surely felt even more today for in two instances within recent months

this Court found it necessary to reverse or vacate decisions in which the Court of Appeals for the District of Columbia had relied on the *Larson* case. *Harmon* v. *Brucker*, 355 U.S. 579 (1958), *Spevack* v. *Strauss*, 355 U.S. 601 (1958). The various errors and ambiguities revealed in the opinion below, the deep division in the Court of Appeals on this general question, and the importance of this issue to the preservation of individual rights against bureaucratic tyranny demonstrate the very great need for further clarification of the doctrine by this Court.

CONCLUSION

For the foregoing reasons, petitioners pray that a writ of certiorari issue to review the judgment rendered by the Court of Appeals for the District of Columbia Circuit in this case.

Respectfully submitted,

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December 4, 1958.

TABLE 1

Decisions of the United States Supreme Court on Injunction and Mandamus Actions Against Federal Officers Since the Larson Case.†

Chapman v. *Sheridan-Wyoming Coal Co.*, 338 U.S. 621 (1950)

Suit by lessee of coal mining rights in Federal lands to restrain Secretary of the Interior from leasing similar rights to a competitor;

American Communications Asso. v. *Douds*, 339 U.S. 382 (1950)

Suit by labor union to restrain regional director of National Labor Relations Board from enforcing non-Communist affidavit provision of the Labor Management Relations Act;

Ewing v. *Mytinger & Casselberry*, 339 U.S. 594 (1950)

Suit against Federal Security Administrator to restrain enforcement of the multiple libel provision of the Federal Food, Drug, & Cosmetic Act;

Snyder v. *Buck*, 340 U.S. 15 (1950)

Mandamus action to compel Paymaster General of the Navy to pay plaintiff a widow's allowance;

Robertson v. *Chambers*, 341 U.S. 37 (1951)

Mandamus action to compel president of Army Disability Review Board to remove certain medical reports from records of case before the Board;

† Exclusive of suits to enjoin deportation or authorized by statute.

**Joint Anti-Fascist Refugee Com. v. McGrath*, 341 U.S. 123 (1951)

Suit to enjoin Attorney General from listing plaintiffs as Communist organizations;

Elder v. Brannan, 341 U.S. 277 (1951)

Suit by former employees of Department of Agriculture against Secretary of Agriculture to enforce alleged employment rights;

**Brannan v. Stark*, 342 U.S. 277 (1952)

Suit by dairy farmers to enjoin Secretary of Agriculture from enforcing order concerning payments to be made to co-operative associations;

**Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)

Suit by steel companies to restrain Secretary of Commerce from enforcing an executive order of the President directing federal seizure and operation of plants of steel companies;

Ramspeck v. Fed. Trial Examiners, 345 U.S. 128 (1953)

Suit by organization of trial examiners to enjoin Civil Service Commissioners from enforcing certain orders concerning trial examiners;

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* Cases in which plaintiffs prevailed. In cases in which defendants prevailed, they prevailed on grounds other than sovereign immunity.

International L. & W. Union v. Boyd, 347 U.S. 222 (1954)

Suit by labor union to enjoin certain construction of immigration laws by District Director of Immigration and Nationalization Service;

Allen v. *Grand Central Aircraft Co.*, 347 U.S. 535 (1954)

Suit by company charged with violating Defense Production Act to enjoin Regional Chairman of Wage Stabilization Board from initiating administrative proceedings against company;

Peters v. *Hobby*, 349 U.S. 331 (1955)

Suit by consultant to United States Public Health Service against Secretary of Health, Education & Welfare to have his removal and debarment from federal employment declared invalid;

Cole v. *Young*, 351 U.S. 536 (1956)

Suit by former government employee against Civil Service Commissioners to have his discharge from the government service declared invalid;

Service v. *Dulles*, 354 U.S. 363 (1957)

Suit by former Foreign Service Officer against Secretary of State to have his discharge from the government service declared invalid;

---

* Cases in which plaintiffs prevailed. In cases in which defendants prevailed, they prevailed on grounds other than sovereign immunity.

Wilson v. *Girard*, 354 U.S. 524 (1957)

Suit by American soldier to enjoin Secretary of Defense from delivering him to Japanese authorities for trial in Japanese courts;

**Harmon* v. *Brucker*, 355 U.S. 579 (1958)

Mandamus action by soldiers to direct Secretary of the Army to issue honorable discharge certificates to them;

**Spevack* v. *Strauss*, 355 U.S. 601 (1958)

Remand to allow amendments to complaint in suit against Atomic Energy Commissioners to enjoin them from publishing contents of plaintiff's patent application;

**Kent* v. *Dulles*, 357 U.S. 116 (1958)

**Dayton* v. *Dulles*, 357 U.S. 144 (1958)

Suits by United States citizens against Secretary of State for declaratory judgments requiring Secretary to issue passports.

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* Cases in which plaintiffs prevailed. In cases in which defendants prevailed, they prevailed on grounds other than sovereign immunity.

TABLE 2

Opinions of Court of Appeals for the District of Columbia Circuit Since Larson Case, Illustrating Division of Court on Sovereign Immunity Issue.

Cases	Judges who would assume jurisdiction	Judges who would deny jurisdiction
(A) Where ownership of property is involved		
Dollar v. *Land* 184 F. 2d 245 (1950)	Clark	
Land v. *Dollar* 190 F. 2d 366 (1951) 190 F. 2d 623 (1951)	Miller Prettyman	
Story v. *Snyder* 184 F. 2d 454 (1950)	Miller (dissent)	Edgerton Washington
Seiden v. *Larson* 188 F. 2d 661 (1951)		Edgerton Washington Proctor
Chapman v. *El Paso Natural Gas Co.* 204 F. 2d 46 (1953)	Clark Proctor Prettyman (conc. in part)	
West Coast Expl. Co. v. *McKay* 213 F. 2d 582 (1954)	Stephens Clark Miller Prettyman Bazelon	Washington Edgerton Fahy (concur in result)
Clackamas County v. *McKay* 219 F. 2d 479 (1954)	Prettyman Miller	Edgerton (dissent)
McKay v. *Central Electric Power Corp.* [redacted] 2d 623 (1955)		Bazelon Edgerton Bastian
McKay v. *Wahlenmaier* 226 F. 2d 35 (1955)	Prettyman Miller	Washington (dissent)
Nez Perce Tribe v. *Seaton* 257 F. 2d 206 (1958)		Edgerton Bazelon Fahy

Cases	Judges who would assume jurisdiction	Judges who would deny jurisdiction
(B) Where personal liberty is involved		
Joint Anti-Fascist Ref. Comm. v. *Clark* 177 F. 2d 79 (1949)	Edgerton (dissent)	Clark Proctor
Bailey v. *Richardson* 182 F. 2d 46 (1950)	Edgerton (dissent)	Prettyman Proctor
Fay v. *Miller* 183 Fv 2d 986 (1950)	Edgerton Bazelon Fahy (not part of decision, mere dictum)	
Harmon v. *Brucker* 243 F. 2d 613 (1957)	Bazelon (dissent)	Prettyman Danaher

APPENDIX A

UNITED STATES EX REL. THE NEZ PERCE TRIBE OF INDIANS AND WILLIAM N. STEVENS, *Appellants*,

v.

FRED A. SEATON, Secretary of the Interior, *Appellee*.

No. 14258

United States Court of Appeals
District of Columbia Circuit

Argued May 2, 1958

Decided May 29, 1958

Petition for Rehearing Denied

Sept. 5, 1958

Mr. Richard Schifter, Washington, D. C., for appellants.

Mr. Harold S. Harrison, Atty., Dept. of Justice, with whom Mr. Roger P. Marquis, Atty., Dept. of Justice, was on the brief, for appellee.

Before EDGERTON, Chief Judge, and BAZELON and FAHY, Circuit Judges.

PER CURIAM.

Appellants seek to enjoin the Secretary of the Interior from conveying certain lands which the appellants claim are held by the United States in trust for them. The United States claims full ownership. The question is highly debatable. Because we think it cannot be decided in a suit in which the United States is not a party, we do not reach it. The United States is not being sued and has not consented to be sued. We think the District Court

was therefore right in entering summary judgment for the Secretary. Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628; cf. Land v. Dollar, 330 U.S. 731, 737-738, 67 S.Ct. 1009, 91 L.Ed. 1209. If the Secretary were violating a plain legal duty in regard to the lands, the case might be different.

Affirmed.

APPENDIX B

Order

Upon consideration of the appellants' petition for rehearing, it is

ORDERED by the court that the aforesaid petition be, and it is hereby, denied.

Dated: September 5, 1958

PER CURIAM.

Order

Upon consideration of appellants' petition for a rehearing en banc, it is

ORDERED by the court that the petition for rehearing en banc be, and it is hereby, denied.

Dated: September 5, 1958

Circuit Judge Burger dissents.

PER CURIAM.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 5492-55

UNITED STATES EX REL. THE NEZ PERCE TRIBE OF INDIANS and WILLIAM N. STEVENS, *Plaintiffs*,

v.

FRED A. SEATON, Secretary of the Interior, *Defendant*.

Ruling by the Court

THE COURT: (Holtzoff, J.) The Court is of the opinion that this is in effect an action against the United States. It seeks to enjoin the Secretary of the Interior from conveying certain lands to which the record title is in the United States and of which the United States claims to have full ownership. It is in effect an action to enjoin the United States from conveying property which it claims to own, in which the plaintiffs claim certain rights, the existence of which the United States denies.

Obviously, the United States is an indispensable party because its rights would be determined and adjudicated. It has not consented to be sued in a case such as this. Under the circumstances the Court will grant the defendant's motion for summary judgment on the ground that the suit is in effect a suit against the United States, and the United States has not consented to be sued.

The plaintiffs' motion is denied.

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Office-Supreme Court, U.S.
FILED
MAR 6 1958
MARIE E. [illegible], Clerk

No. 555

In the Supreme Court of the United States

OCTOBER TERM, 1958

THE NEZ PERCE TRIBE OF INDIANS AND WILLARD N. STEVENS, PETITIONERS

v.

FRED A. SEATON, SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
PERRY W. MORTON,
Assistant Attorney General,
[illegible],
[illegible],
Attorneys,
Department of Justice, Washington 25, D.C.

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In the Supreme Court of the United States

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1a–2a) is reported at 257 F. 2d 206. The District Court did not write an opinion. Its views are set forth in its ruling reprinted at Pet. App. 3a.

JURISDICTION

The judgment of the Court of Appeals was entered on May 29, 1958. A timely petition for rehearing was denied on September 5, 1958 (Pet. App. 2a). The petition for a writ of certiorari was filed on December 4, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, when the legal title to property is in the United States and it has a substantial claim to full ownership, it is an indispensable party to a suit against the Secretary of the Interior seeking to determine and adjudicate rights therein.

STATUTES INVOLVED

1. Pertinent parts of the Act of August 15, 1894, 28 Stat. 286, 326, which ratified an agreement of May 1, 1893, between the Nez Perce Indians and the United States, are as follows:

> ARTICLE I
>
> The said Nez Perce Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title and interest in and to all the unallotted lands within the limits of said reservation, saving and excepting the following described tracts of lands, which are hereby retained by the said Indians, viz: [Here follows a description of 32,020 acres of tribal land] [28 Stat. at p. 327].
>
> * * * * *
>
> ARTICLE III
>
> In consideration for the lands ceded, sold, relinquished, and conveyed as aforesaid the United States stipulates and agrees to pay to the said Nez Perce Indians the sum of one million six hundred and twenty-six thousand two hundred and twenty-two dollars * * * [28 Stat. at p. 329].

2. The Act of June 4, 1953, 67 Stat. 41, 25 U.S.C. Supp. 293a, upon which petitioners rely, provides in full as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Secretary of the Interior, or his authorized representative, is hereby authorized to convey to State or local governmental agencies or to local school authorities all the right, title, and interests of the United States in any land and improvements thereon and personal property used in connection therewith heretofore or hereafter used for Federal Indian school purposes and no longer needed for such purposes: *Provided,* That the consent of the beneficial owner shall be obtained before the conveyance of title to land held by the United States in trust for an individual Indian or Indian tribe: *Provided further,* That no more than twenty acres of land shall be transferred under the terms of this Act in connection with any single school property conveyed to State or local governmental agencies or to local school authorities. Any conveyance under this Act shall reserve all mineral deposits in the land and the right to prospect for and remove such deposits under rules and regulations prescribed by the Secretary of the Interior, shall require the property to be used for school or other public purposes, and shall require the property to be available to Indians and non-Indians on the same terms unless otherwise approved by the Secretary of the Interior. If at any time the

> Secretary of the Interior determines that the grantee of any such lands, improvements, and personal property has failed to observe the provisions of the transfer agreement and that the failure has continued for at least one year, he may declare a forfeiture of the conveyance and the title conveyed shall thereupon revert to the United States. Such determination by the Secretary of the Interior shall be final.

STATEMENT

The complaint in this suit against the Secretary of the Interior involves some 1,700 acres of land in the State of Idaho, but the litigation was directly precipitated by the execution of a deed to 19 of these acres by the Commissioner of Indian Affairs to the Lapwai School District No. 341 in Idaho. The complaint sought an injunction against delivery of the deed to the 19 acres, and also an injunction against interference with use by the petitioners of the remainder of the 1,700 acres.

The land is all part of what is known as the "Agency Reserve" of the Nez Perce Indian Reservation. It is unquestioned that these lands were reserved for the Nez Perce Indians up to May 1, 1893. On that day, an agreement was entered into by the United States and the Nez Perce Indians, which was ratified by the Act of August 15, 1894, 28 Stat. 286, 326, Article I of which provided in part as follows (*supra*, p. 2).

> The said Nez Perce Indians hereby cede, sell, relinquish, and convey to the United States all their claim, right, title and interest in and to

> all the unallotted lands within the limits of said reservation, saving and excepting the following described tracts of lands, which are hereby retained by the said Indians, viz: * * *

Article I continues with a description of the lands "retained" and not ceded to the United States. That description embraces 32,020 acres of tribal land, but it does not include among the excepted lands the Agency Reserve land involved in the instant litigation. Under Article III of the agreement, in consideration for the lands thereby conveyed, the United States "stipulates and agrees to pay to the said Nez Perce Indians the sum of one million six hundred and twenty-six thousand two hundred and twenty-two dollars * * *". 28 Stat. at 329 (*supra*, p. 2).

Pursuant to the terms of the Agreement of May 1, 1893, the President directed allotments to be made to the individual Nez Perce Indians entitled thereto under the terms of the General Allotment Act of February 8, 1887, 24 Stat. 388; and on May 4, 1889, the Acting Commissioner of Indian Affairs directed Miss Alice C. Fletcher to make those allotments and to submit schedules of the lands allotted.

As set out in the answer and the respondent's motion for summary judgment (Jt. App. 6–7, 13), the allotting agent was also instructed to prepare a schedule showing lands occupied by any religious society or organization for religious or educational work among the Indians and "You will also note upon this schedule all tracts occupied for Agency and school purposes." The schedule so submitted included the 19 acres of land proposed to be conveyed to the Lapwai

School District under the Act of June 4, 1953, *supra*, pp. 3–4, and this schedule, together with the schedule of land set apart for graveyards, was approved by the then Secretary of the Interior on March 19, 1895, and the Commissioner of the General Land Office was directed to "cause the same to be noted on the books of his office." (Jt. App. 7.)

In these circumstances the Solicitor of the Department of the Interior ruled that full title to and ownership of the Nez Perce Agency Reserve is solely in the United States and that the proposed transfer of the 19-acre tract in question could be made without tribal consent under the Act of June 4, 1953.[1] Counsel for petitioners took the position that the 1893 Agreement, as ratified by the Act of August 15, 1894, 28 Stat. 286, 326, contemplated that the lands in Agency Reserve status were by implication to be excepted from the cession and remain in tribal ownership; and, accordingly, they sought to have the Solicitor of the Department of the Interior reconsider his decision that the consent of the Tribe was unnecessary (Jt. App. 3). The Solicitor declined to do so and counsel for petitioners was thereafter advised that the deed to the school district had been mailed to the Area Director, Bureau of Indian Affairs, Portland, Oregon, for delivery to the school district.[2]

---

[1] The 1953 Act requires that "the consent of the beneficial owner shall be obtained before the conveyance of title to land held by the United States in trust for an individual Indian or Indian Tribe."

[2] The deed was later returned to Washington pending the outcome of this litigation. See *infra*, pp. 12–16, for later developments.

On December 16, 1955, the petitioners filed the instant suit in which they prayed that the Secretary of the Interior be restrained and enjoined *pendente lite* from conveying the 19 acres of land without the consent of the Nez Perce Tribe; that it be declared and adjudged that the 1,700 acres of land described in the complaint "is the property of the Nez Perce Tribe and is held by the United States in trust for the Nez Perce Tribe"; and that the respondent "be directed to give possession to the plaintiff Tribe of all lands set aside for school, cemetery and agency purposes" (Jt. App. 3).

Upon cross-motion for summary judgment, the District Court ruled (Jt. App. 15):

> The Court is of the opinion that this is in effect an action against the United States. It seeks to enjoin the Secretary of the Interior from conveying certain lands to which the record title is in the United States and of which the United States claims to have full ownership. It is in effect an action to enjoin the United States from conveying property which it claims to own, in which the plaintiffs claim certain rights, the existence of which the United States denies.
>
> Obviously, the United States is an indispensable party because its rights would be determined and adjudicated. It has not consented to be sued in a case such as this. Under the circumstances the Court will grant the defendant's motion for summary judgment on the ground that the suit is in effect a suit against the United States, and the United States has not consented to be sued.

An appropriate judgment was thereafter entered which granted the respondent's motion for summary judgment, denied petitioners' motion, and dismissed the complaint (Jt. App. 15–16).

The Court of Appeals affirmed *per curiam*, stating (Pet. App. 1a): "The United States claims full ownership. The question is highly debatable. Because we think it cannot be decided in a suit in which the United States is not a party, we do not reach it."

ARGUMENT

1. This is a suit to establish rights in land to which the United States has conceded legal title, and over which it has been exercising dominion. Petitioners admitted below, and implicitly acknowledge here (Pet. 8), that the legal title is plainly in the United States, and the most they can claim is a beneficial interest resulting from an alleged contract with the Government. By the Agreement of 1893 (*supra*, p. 2), the Nez Perce Indians relinquished all claim and ceded to the United States all interests in a defined tract of land which, as described, includes the lands involved in this suit; certain lands were expressly excluded from the cession, but they did not include the now disputed area (*supra*, p. 5). The claim advanced in this litigation is that *by implication* the Tribe intended also to reserve a beneficial interest in the lands in question. The Government, on the other hand, denies that any such implied additional exception was created in 1893 and 1894.[3] On

[3] Under well-established rules of construction, where all lands except such as are specifically reserved are conveyed, it is not to be presumed that lands not so listed for exception from the grant were to be reserved.

the face of this controversy, the position of the United States that it has full ownership is, at the very least, a substantial one, as the court below explicitly recognized when it declared that "the question [on the merits] is highly debatable" (Pet. App. 1a).

(*a*). In these circumstances, this Court has recognized and held for well over a century that the sovereign is an indispensable party to any such suit to adjudicate rights in the property. From *Governor of Georgia* v. *Madrazo*, 1 Pet. 110, to *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220, 226, the Court has been of the view that actions to determine interests in, or title to, property in which the Government has a substantial claim are necessarily suits against the sovereign—particularly where, as here, the Government has an admitted interest in, and possession of, the property.[*] In *Louisiana* v. *Garfield*, 211 U.S. 70, involving a claim by the State against the Secretary of the Interior to establish its title to cer-

[*] *Governor of Georgia* v. *Madrazo*, 1 Pet. 110; *Carr* v. *United States*, 98 U.S. 433, 437–438; *Cunningham* v. *Macon & Brunswick R.R. Co.*, 109 U.S. 446, 457; *Christian* v. *Atlantic & N.C. R.R. Co.*, 133 U.S. 233; *Belknap* v. *Schild*, 161 U.S. 10; *Stanley* v. *Schwalby*, 162 U.S. 255, 270, 272; *Minnesota* v. *Hitchcock*, 185 U.S. 373, 386–387; *Oregon* v. *Hitchcock*, 202 U.S. 60, 69–70; *Naganab* v. *Hitchcock*, 202 U.S. 473, 475–476; *Louisiana* v. *Garfield*, 211 U.S. 70, 77–78; *Hopkins* v. *Clemson College*, 221 U.S. 636, 648–649; *Goldberg* v. *Daniels*, 231 U.S. 218; *Lankford* v. *Platte Iron Works*, 235 U.S. 461; *New Mexico* v. *Lane*, 243 U.S. 52, 58; *Morrison* v. *Work*, 266 U.S. 481, 485–486; *Leather* v. *White*, 266 U.S. 592, affirming 296 Fed. 477 (C.A. 7); *Cummings* v. *Deutsche Bank*, 300 U.S. 115, 118; *Minnesota* v. *United States*, 305 U.S. 382, 386; *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 691, 703–705; *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220, 226.

tain lands, Mr. Justice Holmes, for the Court, first assumed "for purposes of decision that if the United States clearly had no title to the land in controversy we should have jurisdiction to entertain this suit" (211 U.S. at 75). He then briefly reviewed the state's argument that it had good title, stated that at least the case was doubtful, and concluded (211 U.S. at 77):

> But that doubt cannot be resolved in this case. It raises questions of law and of fact upon which the United States would have to be heard.

See also, *e.g.*, *New Mexico* v. *Lane*, 243 U.S. 52, 58; *Minnesota* v. *United States*, 305 U.S. 382, 386 (applying this principle to Indian lands in which the United States owns the fee); *Morrison* v. *Work*, 266 U.S. 481, 485.[8]

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[8] *Morrison* v. *Work*, *supra*, presented a case very similar in nature to the instant one. There, Morrison, a Chippewa Indian, filed suit to enjoin the Secretary of the Interior from carrying out various acts of Congress. A motion to dismiss was filed which set up "lack of jurisdiction of the court over the subject matter; lack of necessary parties plaintiff and defendant; and lack of merits." 266 U.S. at 484–485. The trial court sustained the motion to dismiss and the Court of Appeals affirmed. In affirming the judgments below, this Court noted (266 U.S. at pp. 485–486): "The claim of the United States is, at least, a substantial one. To interfere with its management and disposition of the lands or the funds by enjoining its officials, would interfere with the performance of governmental functions and vitally affect interests of the United States. It is, therefore, an indispensable party to this suit. It was not joined as defendant. Nor could it have been, as Congress has not consented that it be sued * * *." (citations in footnotes omitted)

(*b*). Petitioners seek to avoid these repeated rulings by mistakenly relying on the doctrine of *United States* v. *Lee*, 106 U.S. 196, that a government official tortiously acting beyond his authority to occupy or seize wholly private property may be dispossessed in a personal suit. But as shown above the United States has an admitted interest in the land in question; in no event does the Tribe have or claim full ownership as if the land were private.* In addition, petitioners' prayer for relief (Jt. App. 3)—which in the petition for rehearing below they stressed had not been abandoned (R. 22)—seeks to have an affirmative directive issued to the Secretary requiring him to cease dealing with the land and to transfer to the Tribe full possession.

Such a case is clearly governed by the rule that we have set forth above, *supra*, pp. 9-10;—an action must fail, "as one against the sovereign, even if it is claimed that the officer being sued has acted unconstitutionally or beyond his statutory powers, if the relief requested can not be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property". *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 691, fn. 11. In his dissent in *Larson*, Mr. Justice Frankfurter expressly agreed with this principle (337 U.S. at 712):

---

* Contrary to petitioners' derogation of the importance of the Government's legal title to Indian lands, that title is strong enough to support actions by the United States to protect such lands. See the Brief for the United States In Opposition, *Barta, et al.* v. *Oglala Sioux Tribe*, No. 548, this Term, certiorari denied, January 12, 1959.

> The governing principle is clear enough. If a defendant is asked to transfer the possession or title to property which is the Government's, judged by the conventional tests of possession or ownership, or if he is asked to exercise authority with which the State has invested him and the desired action is in fact governmental action so far as an individual is ever *pro tanto* the impersonal government, such demands are effectively demands upon the sovereign, which require the sovereign's consent as a prerequisite to the grant of judicial remedies.

What petitioners ask here is plainly that the Secretary be required "to transfer the possession" of "property which is the Government's, judged by the conventional tests of possession or ownership." In this type of case, there is no judicial disagreement that the suit is against the Government.

2. For these reasons, we believe that the decision below—that this is an unconsented suit against the United States—is clearly correct. But the Court of Appeals went on to indicate that in its view the question on the merits was "highly debatable". In the light of this characterization of the problem, the Department of the Interior has determined that the issue on the merits should be promptly laid to rest, before the proposed conveyance to the Lapwai School District is completed. In a recent letter dated February 27, 1959 (set forth in the Appendix, *infra*, pp. 14–16), petitioners' counsel was formally advised of this administrative determination and of the means by which a judicial ruling on the merits of the controversy can be obtained. Either a suit in the Court of Claims by

petitioners or a suit by the United States to quiet title would be appropriate.

Accordingly, it is now clear that a judicial decision on the merits of the dispute between petitioners and the United States will be had in the Court of Claims or in the District Court for Idaho. Petitioners are no longer in any need of the injunctive relief they seek against the Secretary, and the jurisdictional problem presented by the petition has no further importance in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.
PERRY W. MORTON,
Assistant Attorney General.
ROGER P. MARQUIS,
HAROLD S. HARRISON,
Attorneys.

MARCH 1959.

APPENDIX

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY

WASHINGTON 25, D.C.,
February 27, 1959.

DEAR MR. SCHIFTER: As you know, the Department of the Interior has ruled that title to the so-called Nez Perce Agency Reserve is solely in the United States by virtue of the Agreement of May 1, 1893, ratified by the Act of August 15, 1894, 28 Stat. 286, 326. It was on the basis of that ruling that the Government proposed to convey some 19 acres of that land to the Lapwai School District. Thereupon, as counsel for the Nez Perce Tribe, you instituted an action in the United States District Court for the District of Columbia to enjoin the Secretary from delivering a deed to these 19 acres, and also to enjoin him from interfering with the Tribe's use of other lands (some 1,700 acres) which constitute the balance of the so-called Reserve.

The District Court dismissed the complaint on the ground that the suit was in substance one against the United States to which the United States was not a party and to which it had not consented. The Court of Appeals affirmed on the same ground, but expressed the view that the question on the merits, *i.e.*, whether the United States has "full ownership," was "highly debatable." The Tribe's petition for a writ of certiorari is now pending before the Supreme Court.

In view of the Court of Appeals' expression as to the debatable character of the issue on the merits and in view of the further fact that there does not now appear to be an urgent need which would require a prompt conveyance to the School District, the Secretary has concluded that, regardless of the final outcome of your present suit for injunctive relief, the proposed conveyance will not be made without first laying to rest the issue on the merits. You have been previously advised that this was the direction of our thinking and I write to you at this time in order to confirm our administrative position. This does not, of course, imply any change in our view that title to the property in question was unqualifiedly ceded to the United States by Agreement of May 1, 1893.

There are at least two avenues by which the issue on the merits might be judicially determined. As you are aware, the United States, over a substantial period of years, has leased some portions of the 1700-odd acres and has received rentals therefrom. You have indicated that you are contemplating a suit in the Court of Claims on the theory that the Tribe is entitled to these rental proceeds. Such a suit would necessarily bring into issue the Tribe's claim of a beneficial interest in the property and thus lead to a definitive resolution of the controversy.

For its part, the United States could institute suit to quiet title preliminary to making its proposed conveyance to the School District. We are prepared to follow that alternative course.

We have discussed this entire matter with the Office of the Solicitor General, and it is the Government's intention to advise the Supreme Court, before which the Tribe's petition for a writ of certiorari is pend-

ing, of this Department's administrative position as set forth above.

Sincerely yours,

ROGER ERNST,
Assistant Secretary of the Interior.

Richard Schifter, Esquire
1700 K Street, NW.
Washington 6, D.C.

U. S. GOVERNMENT PRINTING OFFICE: 1959

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 555

THE NEZ PERCE TRIBE OF INDIANS AND WILLIAM N. STEVENS, *Petitioners*,

v.

FRED A. SEATON, Secretary of the Interior, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF

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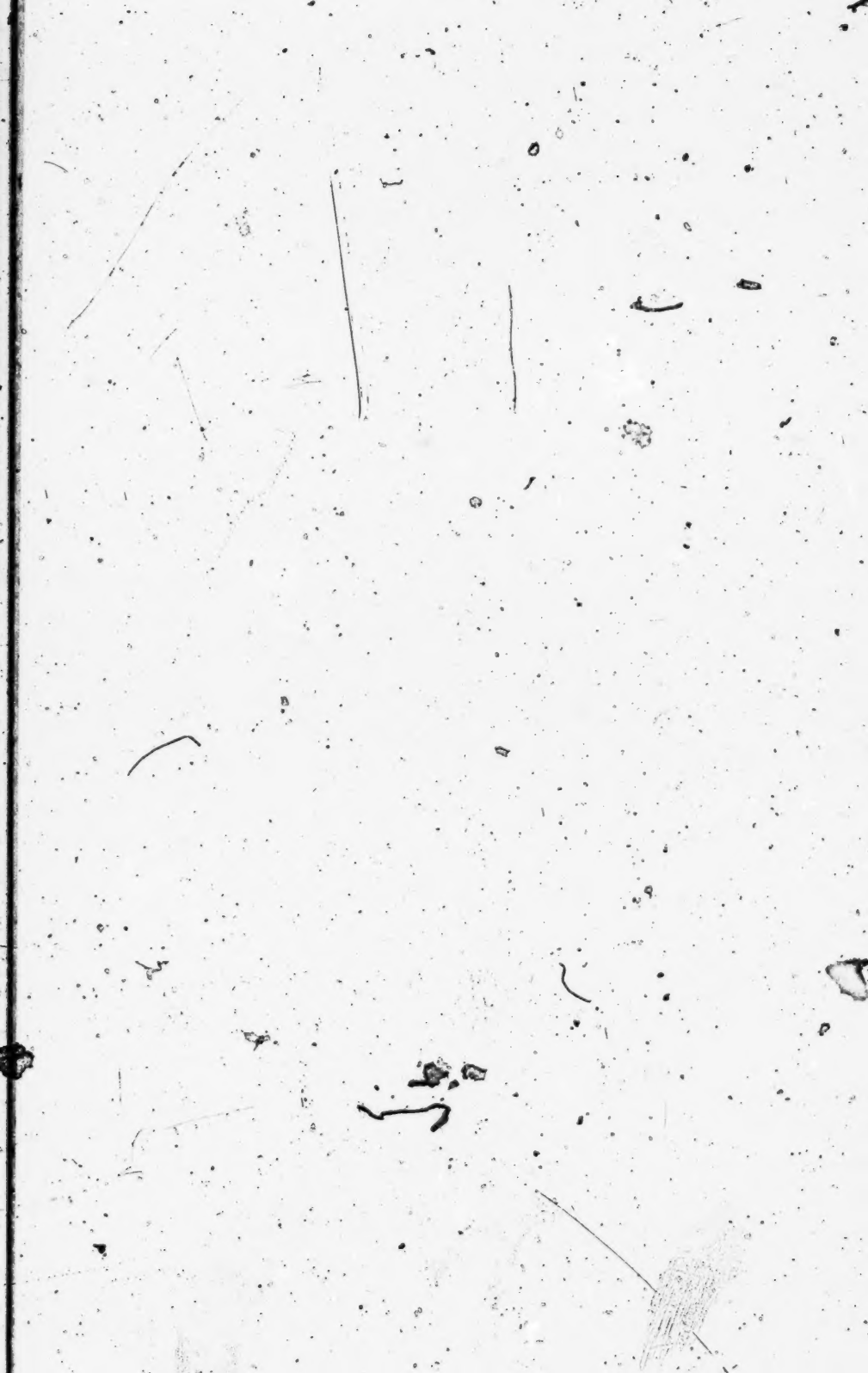

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 555

THE NEZ PERCE TRIBE OF INDIANS AND WILLIAM N. STEVENS, *Petitioners,*

v.

FRED A. SEATON, Secretary of the Interior, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF

I. Respondent's Belated Willingness to Submit This Case to Judicial Review Does Not Remove the Need for Injunctive Relief

Respondent, apparently fearful of the consequences of a grant of certiorari, has made another last-minute "administrative determination" in a frantic effort to

drain this case of live controversy. See *Taylor* v. *McElroy*, No. 504, Oct. Term 1958, now pending before this Court.

The respondent has advised this Court that the Department of the Interior, after having "discussed this entire matter with the Office of the Solicitor General," is prepared to institute suit to quiet title to the land. Or, says the respondent, petitioners could bring suit in the Court of Claims to resolve the merits of the dispute. This "administrative determination" comes almost three months after the petition herein was filed and one week before respondent's answer thereto was due. And it comes nearly nine months after the Court of Appeals characterized the question on the merits as "highly debatable"—the characterization which is now said to have led to this "administrative determination." It comes more than three years after petitioners' request for a five-day delay in the conveyance of the controverted land was rejected, forcing petitioners to bring suit within twenty-four hours following the administrative action and requiring them to obtain a Temporary Restraining Order to prevent respondent from carrying out his illegal scheme.

The suggested alternative courses of judicial action, of course, have been in existence and known to the respondent long before the formulation of this belated "administrative determination." Nothing has intervened between the rendition of the decision of the Court of Appeals below and this Court's consideration of the petition for certiorari except respondent's concern over the possibility of a reversal of the decision below.

The truth of the matter is, of course, that neither of the suggested lawsuits deprives the jurisdictional

problem of importance for purposes of certiorari. The Court expressly held in *Land* v. *Dollar*, 330 U.S. 731, 738 (1947), that where a public official unlawfully holds or claims title to a citizen's realty or chattels, "recoverable by appropriate action at law or in equity, he is not relegated to the Court of Claims to recover a money judgment." Nor have any of the cases in this Court involving disputed title to land suggested that the possibility of a quiet title suit makes it unnecessary to resolve an appropriately raised issue of sovereign immunity in an injunction proceeding. The thrust of the instant action is to restrain the respondent from threatened violation of his statutory duty toward the petitioners, an issue of obvious public importance in the administration of the laws of the United States. That the issue might be resolved in the context of another kind of proceeding does not make it inappropriate to resolve it in the forum where it is first raised.[1]

This sudden concern of the respondent "that the issue on the merits should be promptly laid to rest, before the proposed conveyance to the Lapwai School District is completed" is in sharp contrast to the precipitous action of the respondent which led to the institution of this action in 1955. Then the respondent, although informed of petitioners' determination to obtain judicial review, attempted to moot the case

[1] Indeed, the suggestion of respondent that the merits of the title dispute might be resolved in a quiet title suit in the District Court for Idaho suffers materially from the fact that none of the evidence pertinent to that issue is available in Idaho. The evidence, consisting largely of materials in the National Archives, plus matters of public record, are in Washington, D. C., and are readily available to the District Court for the District of Columbia, where the instant suit originated.

by executing and mailing the conveyance three and a half hours after petitioners had been informed of the rejection of their administrative appeal. As dramatically illustrated by the correspondence and affidavit on file in the original record of this case, and reprinted in the Appendix hereto, petitioners' request for a short delay in the consummation of the transaction to give them "time to consider and institute appropriate legal proceedings for a determination of their interests in the property" was summarily rejected. Only a temporary restraining order, issued at an emergency Saturday session of the District Court, prevented the irretrievable loss of the land so as to make possible any sort of judicial determination of petitioners' rights in this "highly debatable" matter.

The vital need for the injunctive remedy appears most clearly from the following time-table of events:

June 1, 1955—Solicitor of Interior Department rules that Tribe has no interest in tract in controversy;

June 6, 1955—Counsel for Nez Perce Tribe informs Bureau of Indian Affairs of Tribe's intention to submit case to judicial review, requests that no action be taken with regard to the title of the land "until we have obtained a court decision in this matter";

June 8, 1955—Counsel for Nez Perce Tribe requests Solicitor to reconsider administrative determination and to grant opportunity for oral argument;

December 15, 1955 (Thursday)

11:30 a.m.—Counsel for Nez Perce Tribe receives letter from Deputy Solicitor (1) affirming previous administrative determination, (2) rejecting request for oral argument,

(3) advising that "we shall recommend final action on the transfer without further delay";

2-3 p.m.—Counsel for Nez Perce Tribe tries to telephone Assistant Commissioner of Indian Affairs and is informed that he is busy;

3 p.m.—Conveyance of land to Lapwai School District is signed and mailed to Indian Bureau Area Director at Portland for delivery to school officials;

5:30 p.m.—Assistant Commissioner of Indian Affairs returns telephone call of counsel for Nez Perce Tribe, informs counsel of what had transpired at 3 p.m., rejects requests for 30-day postponement of delivery, rejects request for 5-day postponement of delivery, both requests being made for purpose of allowing counsel to prepare suit;

December 16, 1955 (Friday)

Nez Perce Tribe files injunction suit and Motion for Temporary Restraining Order;

December 17, 1955 (Saturday)

District Court issues Temporary Restraining Order preventing delivery of conveyance; counsel for Nez Perce Tribe telegraphs Portland Area Director: "Restraining order signed by Judge Youngdahl today prohibits your delivery of Nez Perce Agency Lands deed."

Thus only through prompt invocation of injunctive relief was the loss of the land prevented in 1955. To suggest that now, after the petitioners have spent nearly three years in an effort to resolve the merits of the issue, the merits can be "promptly laid to rest" by starting all over again in some other tribunal is to propose an unwarranted judicial trap for all those

who seek injunctive relief against public officials about to violate their statutory duties. If injunctive relief was necessary in 1955 and if the jurisdictional defense interposed by the respondent was important in 1955, that relief is just as necessary in 1959 and the validity of that defense is just as important in 1959. The respondent does not and cannot suggest that this injunctive proceeding is moot. Respondent has in no way retreated from his claim to full title to the land and he still proposes to convey the land to the Lapwai School District. All that has happened here is a temporary postponement of the imminence of the challenged conveyance. But the temporary discontinuance of the challenged activity upon which a suit is initially predicated does not deprive this Court of the power to adjudicate the dispute. *Walling* v. *Helmerich & Payne*, 323 U.S. 37 (1944); *United States* v. *W. T. Grant Co.*, 345 U.S. 629 (1953); *Southern Pacific Terminal Co.* v. *I.C.C.*, 219 U.S. 498 (1911) Nor does it make a grant of certiorari any less appropriate where, as here, problems of great importance are involved.

This case, in short, must be viewed in the perspective of a last-ditch effort by respondent to avoid the feared consequences of a grant of certiorari: Cf. *Taylor* v. *McElroy*, No. 504, Oct. Term 1958, now pending before this Court. So viewed, the jurisdictional problem presented by the petition assumes even greater public importance than might otherwise be attached to it. The action of the respondent can only be interpreted as an implicit concession that the decision below was probably wrong and that petitioners were entitled to a decision on the merits in the District Court for the District of Columbia.

II. Respondent Misinformed the Court as to the Merits of This Controversy

Respondent's brief states that "[b]y the Agreement of 1893 . . . the Nez Perce Indians relinquished all claims and ceded to the United States all interests in a defined tract of land which, as described, includes the lands involved in this suit." (p. 8). It states further that petitioners' claim was that the disputed lands were exempted by implication (pp. 6, 8).

Respondent has misinformed the Court on both counts, although surely inadvertently.[2] Petitioner Tribe, as a mere reading of Article I of the Agreement of 1893 reveals, most certainly did not cede "a defined tract of land." It ceded *the unallotted lands* within a defined tract. And petitioners do not contend that the disputed lands were exempted *by implication*. Petitioners' contention is that the term *unallotted lands* did not cover the lands allotted for school, agency, or graveyard purposes, and that these lands were thus explicitly excluded from the cession. The dispute in this case revolves around the scope of the area included in the term *unallotted lands*.

It is respectfully submitted that respondent's bare assertion, without proof, that the lands here in controversy were unallotted lands and were thus ceded does not make its claim so substantial a one as to warrant summary disposition on the pleadings on the basis of a sovereign immunity defense. If it did, any mere assertion contained in the pleadings could be said to advance a substantial claim. Surely, the doctrine of

[2] Respondent's errors point up the folly of trying to determine the jurisdictional issue after fleeting glimpses at, rather than full consideration of, the merits.

sovereign immunity should not turn on the ingenuity exercised by counsel for the defendant Government official in framing the pleadings.

III. Indian Trust Land Is Entitled to as Much if Not More Protection Than Other Private Land

As the petition points out, the decision below is in direct conflict with *Land* v. *Dollar*, 330 U.S. 731 (1947), *Ickes* v. *Fox*, 300 U.S. 82 (1937), *Philadelphia Co.* v. *Stimson*, 223 U.S. 605 (1912) and *United States* v. *Lee*, 106 U.S. 196 (1882). Respondent seeks to avert the impact of these decisions by arguing that the benefits accorded private property by those decisions is not enjoyed by Indian trust property.

Respondent's argument on this aspect of the case was anticipated in the Petition, pp. 8-9. At this point it need merely be added that respondent has been unable to distinguish between form and substance in speaking of the "admitted interest" of the United States in Indian trust land. The United States has an admitted interest in the land, but it is an interest to be asserted for the purpose of *protecting* rather than undermining the Indian interest. See *Jaybird Mining Co.* v. *Weir*, 271 U.S. 609, 612 (1926).[3]

Indian trust land is most assuredly private property, fully protected by Constitutional guarantees. See *Chippewa Indians* v. *United States*, 301 U.S. 358 (1937), *United States* v. *Klamath and Moadoc Tribes*, 304 U.S. 119 (1938). The relationship to the United

[3] As was said in Cohen, *Handbook of Federal Indian Law* (1942 ed.), p. 309: "Tribal possessory right in tribal land requires protection not only against private parties but against administrative officers acting without legal authority and against persons purporting to act with the permission of such officers."

States implicit in the concept of the United States holding the land in trust for the Indians adds certain special protective rights rather than detracting from the rights of the Indians. See *Minnesota* v. *Hitchcock*, 185 U.S. 373, 387 (1902). To suggest that the assumption of trust responsibility removes the trustee from accountability and permits him to deal with the beneficiary's land as if it were his own, means turning all applicable legal standards upside down. The apparent misconceptions of the Government official directly charged with carrying out the Government's trusteeship responsibilities as to the nature of these responsibilities is an added reason for the grant of this petition.[4]

IV. A Judgment for Petitioners Would Not Require an Affirmative Directive to Respondent

As discussed in the Petition, pp. 10-11, injunctive relief is all that petitioners seek. This is not a case in which petitioners seek specific performance of a contract or other legal obligation, through conveyance to them of "unquestionably sovereign property."[5] Cf. *Goldberg* v. *Daniels*, 231 U.S. 218 (1913). An injunction prohibiting respondent to deal with the land as if it were public land is all that is required. No "transfer" to petitioner Tribe would be needed.

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[4] Respondent's reference to *Barta, et al.* v. *Oglala Sioux Tribe*, No. 548, this Term, certiorari denied, January 12, 1959 is illustrative of his confusion. In the *Barta* case the United States exercised its trustee function to help protect Tribal land. Its action in that case is surely no authority for defeating Tribal rights in this case.

[5] Significantly, the Court below was prepared to go that far in *West Coast Expl. Co.* v. *McKay*, 213 F. 2d 582 (1954), thus adding to the total confusion of the law in this area.

Respondent is thus clearly mistaken when it suggests that petitioners are seeking the issuance of an "affirmative directive." By thus failing to show an understanding of the relevant concepts in this area of law, respondent has underlined the need for a definitive pronouncement by this Court which can come only through a grant of the Petition.

CONCLUSION

For the reasons set forth herein as well as in the Petition, petitioners pray that a writ of certiorari issue to review the judgment rendered by the Court of Appeals for the District of Columbia Circuit in this case.

Respectfully submitted,

RICHARD SCHIFTER
EUGENE GRESSMAN
1700 K Street, N. W.
Washington 6, D. C.
Counsel for Petitioners

March 13, 1959

APPENDIX

The following letters and affidavit were filed on December 16, 1955, in the District Court in support of the Motion for a Temporary Restraining Order:

June 6, 1955

Mr. W. Barton Greenwood
Assistant Commissioner
Bureau of Indian Affairs
Department of the Interior
Washington 25, D. C.

Dear Mr. Greenwood:

The purpose of this letter is to confirm our conversation earlier today concerning the Nez Perce Agency Reserve. By letter of May 16, 1954 you advised me of the intent of the Bureau of Indian Affairs to transfer a certain portion of these lands to the Lapwai School District. You suggested at that time that if I have any evidence as to the Nez Perce Tribe's interest in the land I submit it to you. I did so by letter of June 16, 1954.

I am now in receipt of a communication from Solicitor Armstrong, forwarding a copy of a memorandum to the Commissioner of Indian Affairs, in which the opinion is expressed that the Nez Perce Tribe does not have an interest in the land in question. As I indicated to you in our telephone conversation, I would consider it in the interest of all concerned if a judicial determination of this issue were obtained. I am now preparing the necessary complaint and request most respectfully that you do not take any action with regard to the title of the land until we have obtained a court decision in this matter.

Sincerely yours,

/s/ Richard Schifter
Richard Schifter

June 8, 1955

Mr. J. Reuell Armstrong
Solicitor
Department of the Interior
Washington 25, D. C.

Dear Mr. Armstrong:

I refer to your letter of June 1, 1955 and the memorandum attached thereto concerning the status of the Nez Perce Agency Reserve. I believe the conclusion reached in the memorandum is clearly erroneous. By letter of June 6, 1955, I consequently advised Commissioner Greenwood that the matter at issue will now have to be tested in the courts.

Although the exhaustion of administrative remedies does not appear to be a necessary prerequisite to a judicial proceeding in this case, I respectfully request that the question of the ownership of the Reserve lands be reconsidered by you and that I be allowed to argue the matter orally before you. If the final decision should be adverse to the Nez Perce Tribe, I also request that it be approved by the Secretary.

By following the above course, we can be certain of removing future procedural obstacles to litigation. At the same time we would provide a further opportunity for resolving this question without causing the Government and the Tribe the expense of litigation.

Sincerely yours,

/s/ Richard Schifter
Richard Schifter

cc: Mr. W. Barton Greenwood

December 9, 1955

Richard Schifter, Esquire
Strasser, Spiegelberg, Fried & Frank
810 Eighteenth Street, Northwest
Washington 6, D. C.

Dear Mr. Schifter:

Your letter of October 10, 1955, and supplementary memorandum in the matter of the Lapwai Reserve, Northern Idaho Agency, has been carefully considered. We do not find such new points or arguments as would cause us to revise our earlier opinion that the title to the lands involved in the proposed transfer to Lapwai School District 341 is solely in the United States, and as the matter has been extensively covered in your memorandum, it does not appear that oral argument would serve any good purpose.

We shall continue to maintain that these lands were ceded to the United States and were not included in the areas specifically reserved for Indians by the Agreement of 1893. The conveyance, therefore, may be made without the Tribe's consent.

Since it appears to be to the best interests of all the parties, we shall recommend final action on the transfer without further delay.

Sincerely yours,
/s/ EDMUND T. FRITZ
Deputy Solicitor.

DISTRICT OF COLUMBIA, SS.:

Affidavit

ARTHUR LAZARUS, JR., being duly sworn, deposes and says:

I am an attorney in the law firm of Strasser, Spiegelberg, Fried & Frank, 1700 K Street, N. W., Washington 6, D. C., which serves as counsel for the Nez Perce Tribe of Indians pursuant to a written contract duly approved by the Commissioner of Indian Affairs and assigned Symbol 14-20-650, Contract No. 122. I am a member of the Bars of the State of New York, the District of Columbia, the Court of Appeals for the District of Columbia Circuit, and the Supreme Court of the United States.

On or about October 15, 1955, I caused to be mailed to the Commissioner of Indian Affairs an announcement reporting the change of address of Strasser, Spiegelberg, Fried & Frank from 810 18th Street, N. W., Washington 6, D. C., to 1700 K Street, N. W., Washington 6, D. C., effective as of October 15, 1955. Thereafter, our records show that I and other employees of the firm received letters from various officers of the Interior Department and the Bureau of Indian Affairs addressed to 1700 K Street, N. W., Washington 6, D. C.

On December 15, 1955, at approximately 11:30 a.m., the firm received a letter signed by Edmund T. Fritz, Deputy Solicitor, Department of the Interior, and sent to Richard Schifter, an attorney in the firm, a certified copy of which is attached hereto as Exhibit 1. This letter, although dated December 9, 1955, was postmarked at 8:00 p.m. on December 14, 1955, and was addressed to 810 18th Street, N. W., Washington 6, D. C.

The aforementioned letter expresses the Department's opinion that title to certain lands in Idaho claimed by the

Nez Perce Indians and proposed to be transferred to Lapwai School District 341 "is solely in the United States." The letter further states that the conveyance "may be made without the tribe's consent" and "we shall recommend final action on the transfer without further delay."

At the request of Mr. Schifter, then in New Haven, Connecticut, on December 15, 1955, at approximately 2:00 p.m., I called W. Barton Greenwood, Assistant Commissioner of Indian Affairs, Department of the Interior, and the administrative officer with whom Mr. Schifter had been dealing, to request that the transfer of title to the land be postponed for thirty days to give the Indians time to consider and prepare for a judicial determination of their rights. I was advised by his secretary that Mr. Greenwood was busy on another phone and, consequently, left a message for him to return my call, stating that the matter was urgent. At approximately 3:00 p.m., not having heard from Mr. Greenwood, I placed another call to his officer but was informed that he was in conference.

At approximately 5:30 p.m. on December 15, Mr. Greenwood returned my call. I then advised him of our receipt of the letter of December 9 only six hours earlier, and requested that title to the lands not be transferred to the School District for 30 days so that the Indians could consider and institute appropriate legal proceedings for a determination of their interests in the property prior to its conveyance to a third party to their prejudice. Mr. Greenwood informed me that he could not grant this request since the deed to the land had been signed by the Commissioner of Indian Affairs at about 3:00 p.m. on December 15, and already had been sent by air mail to the Area Director, Bureau of Indian Affairs, at Portland, Oregon, for delivery to the School District. Mr. Greenwood further indicated that he would not attempt to postpone delivery of the deed even if such action were physic-

ally possible and even if the postponement sought were reduced from 30 to 5 days.

/s/ ARTHUR LAZARUS, JR.
Arthur Lazarus, Jr.

The following telegram was sent by counsel for petitioners on December 17, 1955:

"Donald Foster
Area Director
Bureau of Indian Affairs
Portland, Oregon

"Restraining order signed by Judge Youngdahl today prohibits your delivery of Nez Perce agency lands deed. Service will be effected Monday.

RICHARD SCHIFTER."